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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 170.

MASON CITY AND FT. DODGE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

C. D. BOYNTON.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR C. D. BOYNTON.

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I.

The point being made, this court has no jurisdiction to decide the matters presented herein.

To give this court jurisdiction, it must appear by the record, affirmatively, that the circuit court of appeals had jurisdiction.

Mansfield *vs.* Swan, 111 U. S., 379.
Fruit Co. *vs.* Henderson, 170 U. S., 511.
Minnesota *vs.* Securities Co., 194 U. S., 48; 24 Sup. Ct. Rep., 598.

The jurisdictional facts must appear affirmatively, or it will be presumed that jurisdiction does not exist. It is not

enough that it might be inferred, argumentatively from averment of facts found in a petition for removal.

Fife *vs.* Whittell, 102 Fed., at 539.

The circuit court of appeals has no jurisdiction where the sole question presented to it is whether the circuit court had, as a Federal court, jurisdiction.

1 U. S. Comp. Stat. (1901), pp. 549-550.
Powers *vs.* Railroad, 169 U. S., 92.

This is so where questions other than jurisdiction are suggested, but suggested incidentally only.

Torrence *vs.* Shedd, 144 U. S., 527; 12 Sup. Ct. Rep., 726.

II.

Within the meaning of the Removal Act, this land owner was not a plaintiff, and no case holds that he is except Myers vs. Railway, 118 Iowa, 312, and Kirby vs. Railway, 106 Fed., 552.

The non-resident land owner may remove before he appeals to the State court from award made.

Railway *vs.* Day, 54 Fed., 545.
Traction Co. *vs.* Mining Co., 196 U. S., 249, 25 Sup. Ct. Rep., 377.

A.

While State laws, and decisions by State courts of last resort, may, as to litigants who remain in the courts of the State, settle, arbitrarily, who is plaintiff, neither a legislature or such courts may, directly or indirectly, abridge the right

to remove to the Federal court in a case of which that court has original, concurrent jurisdiction.

Hess *vs.* Reynolds, 5 Sup. Ct. Rep., 377.
Myers *vs.* Railway, 118 Ia., at 321.
Terminal Co. *vs.* R'y, 119 Fed., 209.
Searle *vs.* District, 124 U. S., 197, 8 Sup. Ct. Rep., 460.
Traction Co. *vs.* Mining Co., 196 U. S., at 249, 252, 254, 255, 256.
Reagan *vs.* Loan Co., 154 U. S., at 391.

What is removable in one State must be so in every other; and a State may not vary the standard of removability by making proceedings which affect the property rights of a non-resident unlike what suits usually are.

See citations last made.

B.

While the Federal courts will, in such cases as plaintiff in error cites, follow the decisions of the highest State courts, even where the soundness of such decisions is not approved, this rule does not apply to State decisions that directly or indirectly tend to abridge the jurisdiction of the Federal courts.

Cases last cited.

C.

While it has been settled that certain instances of seeking to increase an award are equivalent to beginning suit to obtain pay for land appropriated, this does not necessarily settle that every non-resident land owner who appeals from a condemnation award is a plaintiff within the meaning of the removal act, and the cases that so defined the beginning of suit did not, and had no occasion to, hold that such owner was such plaintiff.

If it may be claimed that some of the cases so defining

the beginning of suit do hold that the appealing land owner was a plaintiff, they do so on the theory that his appeal could not and did not present anything but the question of compensation.

D.

Under the statutes of Iowa such appeal could also present whether conditions existed which, under such statutes, warranted condemnation proceedings.

See certificate of C. C. A.

Terminal *vs.* R'y, 19 Fed., 209.

Under said statutes the condemnation at bar was sufficiently a judicial proceeding to make the one who instituted it, rather than the owner who appealed from the award, the plaintiff.

See certificate of C. C. A.

Traction Co. *vs.* Mining Co., 196 U. S., 241, 242, 243, 244, 248, 249, 250, 251.

Boom Co. *vs.* Patterson, 98 U. S., at 404.

Searle *vs.* District, 124 U. S., 199, 200.

E.

Had the Iowa statutes done less than to make the proceedings on condemnation sufficiently judicial to allow a hearing on whether the right to condemn existed, and confined them to the mere right to have compensation ascertained, there would have been a denial of due process of law.

Traction Co. *vs.* Mining Co., 196 U. S., at 251, 252.

F.

While consent can not give jurisdiction, if one party assert the facts necessary to jurisdiction, they are not put in issue,

and a court competent to try the question whether jurisdiction exist, decides that it does, it is an adjudication that jurisdiction exists.

Judicial decisions can not create jurisdiction in the tribunal that decides it has it, but a court, competent to try the question of fact or law involved, can, by deciding that another court has jurisdiction, preclude inquiry into said jurisdiction unless the decision is directly attacked.

R'y *vs.* Daughtry, 11 Sup. Ct. Rep., 306.
Cable *vs.* R'y, 88 Fed., 803.
Council *vs.* Smiley, 15 Sup. Ct. Rep., 353.
Davies *vs.* Lathrop, 13 Fed., 565.
R'y *vs.* Ramsey, 22 Wall., 322.
Sims *vs.* Hundley, 6 How., 1.
De Sobrey *vs.* Nicholson, 3 Wall., 420.
Goodnow *vs* Burrows, 74 Ia., at 266.
Kirby *vs.* R'y, 106 Fed., 552.

G.

While it is true that the order of the State court granting a removal will not avail against conflicting action on part of the Federal courts, if such order is neither appealed from nor nullified by the court to which the removal is taken, such order of the State court, as against collateral attack, establishes conclusively that there was jurisdiction to remove.

Telegraph Co. *vs.* Griffith (Ga.), 30 S. E. Rep., 420.
Dillon's Rem. of Causes (5 ed.), 174.
Black, Dillon Rem., par. 191.
Removal Cases, 100 U. S., 474.
Stone *vs.* South Carolina, 117 U. S., 430; 6 Sup. Ct. Rep., 799.
Bank *vs.* Dodge, 42 N. J. L., 316.
Walker *vs.* O'Neil, 38 Fed., 374.
Goodnow *vs.* Burrows, 74 Ia., at 266.

III.

Assume that the non-resident land owner was plaintiff, and concede that a resident defendant cannot remove, and it does not follow, in all cases, that a removal by such non-resident plaintiff so leaves the court removed to without jurisdiction, that waiver and consent are of no avail.

That he cannot remove, if objection be made, is conceded. But that does not settle whether he may remove if objection be not made, or the removal consented to.

Removal neither adds to nor takes from jurisdiction. Every authorized removal presupposes jurisdiction to try the matter removed. Removal but sets that jurisdiction in motion. The jurisdictional elements required in the matter at bar are these and none other: First, a civil suit; second, more than $2,000 in controversy; third, diversity of citizenship.

That a party not named in the statute seeks to have the Federal court exercise its jurisdiction in such a case will warrant a remand on objection, but if the non-resident applies, that court does not lack power to try such suit.

1 U. S. Comp. St., pp. 508, 509.
Baggs *vs.* Martin, 179 U. S., 206; 21 Sup. Ct. Rep., 109.
Traction Co. *vs.* Mining Co., 196 U. S., 245, 246, 247, 251, 254.
Davies *vs.* Lathrop, 13 Fed., 565.
R'y *vs.* Lumber Co. 37 Fed., 3. (Brewer.)
Fales *vs.* R'y, 32 Fed., 672.
R'y *vs.* Davidson, 157 U. S., at 208.
Kohl *vs.* U. S., 91 U. S., at 375.
U. S. *vs.* Jones, 109 U. S., at 519.
Myers *vs.* Railway, 118 Ia., at 319.
Foulke *vs.* Gray, 120 Fed., 156.
Banks *vs.* Calhoun, 102 U. S., 256; 26 L. C. P., 101.
Goodnow *vs.* Burrows, 74 Ia., 251.

A.

We do not claim that this is true of removal by a resident defendant,—which is the case of Martin *vs.* Snyder, 148 U. S., 663.

The very spirit of the removal act excludes the resident defendant. He should not claim he fears his own courts. The removal act is not a change of venue statute. A resident defendant sued in the courts of his State by a non-resident cannot say, on removing, that he thus places a case in the Federal court which he might have put before its original jurisdiction. He has no case that he can put anywhere. He cannot sue himself, nor compel the plaintiff to sue in Federal court or in any other.

IV.

Assume that a removal by a non-resident plaintiff confers no jurisdiction on the Federal court, still where, as here, it is conceded by defendant in error that plaintiff could at one time have brought the very suit removed, originally, in the very court to which removal was attempted, it follows that, no objection being made, the abortive removal became an informal method of trying this suit as an original one in a court that had power to try such suit.

Citations under Point 3.

Davies *vs.* Lathrop, 13 Fed., 565.
Danforth *vs.* Thompson, 34 Ia., 243.
County *vs.* Ralls, 18 Ill., 29.
Miller *vs.* Hayes, 20 Ind., 452.
Wholsen *vs.* Anderson (Minn.), 55 N. W., 597.
Lee *vs.* Parrott, 25 Minn., 128.
Mackey *vs.* Briggs (Colo.), 26 Pac., 131.
Rhyne *vs.* Lipscombe, 122 N. C., 650.

A.

It is true that when the non-resident sues in the State court, that is an election which he cannot revoke, if there be objection; but who will claim that the existence of the defense of election destroys jurisdiction.

ARGUMENT.

I.

This record does not show affirmatively that this court has jurisdiction.

The certificate states that the main point presented was whether Boynton was the plaintiff. It submits nothing here but the question whether the circuit court had jurisdiction. It adds but one statement to this—that an assignment of errors was made challenging the sufficiency of the testimony to sustain the award made by the circuit court. It does not say that this assignment was argued or pressed. It is quite clear that defendant in error did not mean to go on with such an assignment. In its brief in the circuit court of appeals it abandoned that assignment, stating no relief could be had upon it, and that it was put in to show that court that there was some excuse for the raising of the question of jurisdiction. Jurisdiction is not presumed. It is not made out by argumentative deductions. The circuit court of appeals had no jurisdiction, if the sole point presented to it was whether the circuit court, as a Federal court, had jurisdiction. To review that, is exclusively for this court, on certification direct from the circuit court. That the circuit court of appeals had jurisdiction does not appear, affirmatively.

For it does not so appear that jurisdiction of the circuit court was not the sole question before the circuit court of appeals. By fair inference, it appears, instead, that jurisdiction was the *sole* question before the certifying court.

The first fundamental question is the jurisdiction of the court from which the record comes.

Mansfield *vs.* Swan, 111 U. S., 379.

That, whether the circuit court lacked jurisdiction, was *not* the sole question before the circuit court of appeals, is essential to the jurisdiction of the certifying court.

Vol. I, U. S. Comp. Stat. (1901), pp. 549-550.
Powers *vs.* Ry., 169 U. S., 92

Where in a bill for partition, its main object is the assignment of several shares to tenants in common, and in which the determination of conflicting or controverted title is merely incidental, a dispute as to title claimed in an undivided share is not such a separable controversy as would justify a removal

Torrence *vs.* Shedd, 144 U. S., 527 (12 Sup. Ct. Rep., 726).

The jurisdictional facts must appear affirmatively or else it will be presumed the jurisdiction does not exist. That it may be inferred argumentatively from any averment in the petition as to the facts is not sufficient.

Fife *vs.* Whittell, 102 Fed., at 539.
Fruit Co. *vs.* Henderson, 179 U. S., 511.

When the record does not affirmatively show jurisdiction of the circuit court, the supreme court must on its own motion assert and act on such want of jurisdiction.

State *vs.* Securities Co., 194 U. S., 48 (24 Sup. Ct. Rep., 598).

It is not overlooked that this court has power to determine this matter, had it reached it on certificate from the circuit court, instead of the circuit court of appeals. In a sense, the departure from the law is modal. It may be waived. But it is being objected to, and not being waived.

II.

This land owner is not a plaintiff within the meaning of the removal act.

THIS COURT HAS NEVER HELD SUCH AN ONE TO BE SUCH PLAINTIFF. WITH EXCEPTIONS TO BE NOTED, NO CITATION MADE BY PLAINTIFF IN ERROR SO HOLDS. DECLARATIONS BY THE HIGHEST COURT OF A STATE, THAT HE IS SUCH PLAINTIFF, ARE NOT OF THE CLASS OF DECISIONS WHICH ARE BINDING ON THE FEDERAL COURT.

The statutes of Iowa declare the appealing land owner is a plaintiff. *Myers'* case, 118 Ia., 312, holds that this enables a non-resident condemnor to remove after the owner has appealed from award. *Kirby's* case, 106 Fed., 552, takes the same view, but declares that the said statute declaration is not controlling in arriving at the conclusion reached. Upon this, plaintiff in error asserts:

> The true character of the procedure, the matter in issue, the relation each party bears to the controversy have all been determined by the decision of the State court of last resort, and this decision should be conclusive (page 30).

We do not question this as to any such decision to which the owner was a party; and it is the law for every citizen of Iowa and for all who remain in her courts. Nor is there any dispute over the general rule concerning the effect which the Federal court gives to decisions of the court of last resort in a State.

What is cited in the opposing brief, on this head, is good law. We but question its applicability, and the deductions attempted upon it.

In Point 2 (Plaintiff's Brief, page 5) it is said:

> "The Federal court will respect a construction placed on the condemnation statutes by the State supreme court. It becomes a rule of property."

Again, on page 23:

"The construction given by the State court is controlling, for it is the established doctrine of the United States courts that the decisions of the highest tribunal of the State will be followed in all matters pertaining to the construction of State statutes, and the decisions of the State court *respecting the condemnation of real estate establish a rule of property.*"

While there is no escape from it that this emphatically asserts every decision of a State court is binding *because* it establishes a rule of property, the citations made indicate the real claim—*i. e.*, that such decisions are thus controlling *when* they establish a rule of property. That, of course, we do not dispute. When it is all said, the cases adduced for this text, come to just this:

Traction Co. *vs.* Mining Co., 196 U. S., 250, does not in any way hold any such doctrine. Neither does Miss. Boom Co. *vs.* Patterson.

Bondurant *vs.* Watson, 103 U. S., 281 (26 L. C. P., 447), does not hold, that all construction of State statutes have force because the decision establishes a rule of property, but that decisions which establish such rule in the State are binding on the Federal court.

Lowndes *vs.* Watson, 153 U. S., page 1 (14 Sup. Ct. Rep., at 763), holds, that the definition of a boundary comes under this rule.

Gage *vs.* Pompelly, 115 U. S., 454 (6 Sup. Ct. Rep., at 139), holds, that where a decision of the highest court of a State establishes a rule of property concerning what is not a valid tax title, the Federal courts will follow that rule.

Hardin *vs.* Jordon, 140 U. S., 371 (11 Sup. Ct. Rep., 808) —Patents of the U. S. of land bounded by streams or other

waters, in the absence of reservation or restriction of terms, are to be construed, as to their effect, according to the law of the State in which the land lies.

Burgess *vs.* Seligman, 107 U. S., 20, 33 (2 Sup. Ct. Rep., 10), deals with a Missouri statute governing the status of stockholders of a corporation after dissolution. It is held:

While Federal courts have an independent jurisdiction in the administration of State laws between citizens of different States, concurrent with and not subordinate to that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws—Still, since the ordinary administration of the law is carried on by State courts, in which they finally establish decisions which become rules of property and action in the State, and have all the effect of law, such established rules are always regarded by the Federal courts as authoritative declarations of what the law is; especially with regard to the law of real estate and the construction of State constitutions.

And for the sake of harmony, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced or in doubt.

To this point, nothing has been produced but a perfectly well settled and seemingly irrelevant rule. Then comes:

Long Island *vs.* Brooklyn, 166 U. S., 685 (17 Sup. Ct. Rep., 718), that as to mere matters of procedure in condemnation cases, conflict between statutes and proceedings had thereunder, or conflict between State statutes and State constitutions, the supreme court of the State is conclusive.

In U. S. *vs.* Freeman, 113 Fed., 370, the holding is, that the statutes of the State of Washington respecting condemnation proceedings prescribe a special proceeding distinct from the practice in civil proceedings, and the provisions of the civil practice act authorizing courts in which actions are tried to set aside verdicts for error in assessment of damages are not applicable, and do not authorize the same courts to grant new trials in condemnation cases; and that the Federal court will follow the State supreme court in so construing such statutes.

Where the whole proceeding was under the standing law of the State, and it was sanctioned on appeal by the supreme court of the State, a procedure thus authorized by law, and sanctioned, cannot, on a claim that there was a pretended exercise of eminent domain with a view to destroying a charter, be lightly regarded. It has all the solemnities of a sovereign act (West River Bridge Co., 6 How., 507).

U. S. *vs.* Morrison, 4 Peters, 124, applies the rule to the construction by the State court, that the right to take out an *eligit* is not suspended by suing out a writ of *fi. fa.;* and, consequently, that the lien of a judgment continues pending proceedings on that writ.

Bank *vs.* City, 189 U. S., 71 (23 Sup. Ct. Rep., 604), applies the rule to what effect a State judgment has as *res judicata.*

In Green *vs.* Lessee of Neal, 6 Peters, 291, the rule is applied to the construction by a State court establishing when possession of land creates the bar of limitations.

Leffingwell *vs.* Warren, 67 U. S., 599 (17 L. C. P., 261), holds, that Federal courts will follow the State construction of the statute of limitations.

Bucher *vs.* Ry., 125 U. S., 555 (8 Sup. Ct. Rep., 974), holds that federal courts will follow a construction that, under a given statute, no recovery may be had for injury received in traveling on the Sabbath.

What is the purpose of all this? The answer in the brief of plaintiff is, in effect, that the *Myer's case* rules that this defendant in error has no right to remove, and that the

decision so ruling *establishes a rule of property* (page 29). A denial, in the terms of the assertion, is a sufficient answer. A decision that an appealing land owner is a plaintiff, and may not have a removal, establishes no rule of property. Manifestly, it establishes, if it may, a mere rule of practice and procedure. That it will, ordinarily, be followed in matters of procedure is undoubted. But there is one well defined exception—cases where rules of procedure have or may have the effect of abridging that jurisdiction which the Federal courts do possess. Up to now, with all but one authority analyzed, not a word is said in the brief, on such abridgment. But there is one citation made on this point. On page 27 of appellant's brief, it is said:

"The authoritative character of the decision of the State court will be recognized, even where the effect is to prevent a case from being removed, which would otherwise be removable to the Federal courts."

The case of State *vs.* Railway, 3 Fed., 887, is alone given the burden of sustaining this novel contention. It holds:

Where the court of last resort construes a statute, which imposes a fine upon an employer, if he or those employed by him in operating a railroad, recklessly and negligently kill one not an employé, to be a penal statute, such construction will be followed, and suit brought under such statute be held not removable.

It is not easy to understand why this construction had the effect of making a case non-removable which was removable had it not been for such construction. Suits penal in nature are not removable. If no State court had spoken, a suit to recover the penalty fixed by such a statute as this would not have been allowed to remain in the Federal court. The suit was not removable, not because a State court said it was a penal one, but because it *was* a penal suit.

If such court should declare that a suit to foreclose a mort-

gage was penal, would the Federal courts, in deference, forbid its removal.

The construction of a statute makes no law. A decision which construes one is simply an authoritative statement of what the statute is. What the legislature may not do by enactment, the courts of its State may not do by construing an enactment. A State statute, that every party brought into its courts should be deemed a plaintiff for the purposes of the Removal Act, would not be respected by the Federal courts. A judgment by a State court of last resort, that such statute prevented a non-resident defendant from removing, could receive no treatment differing from that accorded the statute so construed. If the Federal courts are to have the right of self preservation, these statements are truisms. Surely, no such direct abridgment of Federal jurisdiction would be tolerated. No attempt to do the same thing by indirection is in better case.

Who is plaintiff or defendant, is or may be vital on any attempt to remove. Give the State power by legislative act, or judicial interpretation, to settle the status of litigants in suits brought into the State courts, to settle it conclusively by mere assertion of such status, by act or decision—and the State determines the jurisdiction of the Federal courts in every removal case when party status is an element in the right to remove. The Federal court would retain the barren power to say that a defendant could remove, and the State would settle who was a defendant. That the State may by legislative assertion and judicial construction arbitrarily fix such status for litigants who remain in its courts, may be conceded, and would, usually, be of no special consequence. It would ordinarily amount to little more than fixing the burden of proof, the order of testimony, and the right to open and close. But, to allow this where it would arbitrarily keep one in the State court, though the policy of the General Government deemed it right to give him a forum free from bias and maintained by a judiciary that, in

the nature of things, looked at the citizens of all States with the same regard—is simply unthinkable. Without the citation of an authority, this leads, inexorably, to but one logical result—no act and no assertion of any department of a State can deprive a citizen of the right of removal, if he in fact possess it. If one be not a plaintiff, the State cannot prevent his removing, by styling him plaintiff.

Party status is not more essential to removal than is the existence of a civil suit. It goes without saying that the State can no more prevent removal by declaring that a suit which is a civil one is not, than by asserting one to be a plaintiff who is a defendant, or declaring, arbitrarily, what amount is in controversy in such suit.

It is equally clear that what it may not do in suits, generally, it may not do by selecting some particular controversy, for instance, one growing out of the exercise, on delegation, of its eminent domain. That power is its sovereign attribute. The modes and details of its exercise are not. While appellant has, naturally, found it difficult to marshal any law against all this, it should not be, and is not, difficult to fortify my position with authority. The only difficulty arises because these positions have been rarely challenged.

That the State law terms the land owner, plaintiff, is not controlling on the question of removal.

Kirby *vs.* Ry., 106 Fed., 552.
Ry. *vs.* Day, 54 Fed., 545.

State laws cannot directly or indirectly abridge the removal jurisdiction of the Federal courts.

Hess *vs.* Reynolds, 5 Sup. Ct. Rep., 377.
Myers *vs.* Ry., 118 Ia., at 321.

The question whether condemnation is sought for a public use, is for the courts. This is so without regard to legislative assertion, that a use is a public one.

Terminal Co. *vs.* Ry., 119 Fed., 209.

It is not true that in no case can the judicial power of the United States be invoked until the question of taking be consummated by a proceeding in the particular local tribunal designated by the State.

Traction Co. *vs.* Mining Co., 196 U. S., at 255.

No State action can affect removal in cases originally cognizable in the Federal court. Under any other view a State could by its own tribunals, deprive citizens of other States of their property by condemnation without an opportunity to protect themselves in a national court against local prejudice and influence.

Traction Co. *vs.* Mining Co., 196 U. S., at 254.

The circuit court will respect the sovereign power of a State and define the legitimate public purposes for which private property may be taken, upon compensation to the owner being made or secured. But, at the same time, it must enforce the authority of the supreme law of the land as to cases where the circuit court is given jurisdiction over the controversy. *A State cannot, by any statutory provisions, withdraw from the cognizance of the Federal courts a suit in which there is such controversy, or else the judicial power of the United States therein would be defeated.*

Traction Co. *vs.* Mining Co., 196 U. S., at 253.

2.

THIS LAND OWNER WAS NOT, IN FACT, THE PLAINTIFF

Our research has found but three decisions in which this question has been squarely passed upon—and they do not agree. Ry. *vs.* Day, 54 Fed., 545, holds he is not a plaintiff. Myers *vs.* Ry., 118 Ia., at 321, and Kirby *vs.* Ry., 106 Fed , 552, both decided under an Iowa statute declaring the appealing owner to be the plaintiff, hold he is, also, plaintiff in fact. As has been said, the Iowa cases are not controlling, but they are none the less judicial decisions and entitled to whatever weight they carry for being sound and logical—just as though they were not pronounced by a court of the

State having said statute. But the time for analyzing them is not reached.

Many cases are cited by appellant which do not determine this point expressly. The support of the Iowa cases is the reasoning of these other cases, and they will be dealt with together. In essence, plaintiff in error puts the issue thus:

Removal requires a civil suit. The statutes of Iowa are so framed that land may be condemned and title changed by a proceeding which is not judicial and not a civil suit. After such condemnation nothing remains but the amount of compensation. This, either party may have determined by appealing from the inquest. The taking of such appeal, for the first time, begins a suit. If a non-resident owner appeal, that makes him a plaintiff in fact, and he cannot remove. But, after award and when nothing remains but to settle compensation, he may refrain from appealing, and sue originally in the Federal court, but as to nothing but the amount due him. If he, instead, appeal, he has made such an election of forum as that, if he afterward sue in the Federal court, that court is wholly without jurisdiction, though the condemner make no objection and agree to try that suit in that court, and it proceeds then to judgment without objection.

It is not denied that removals have been sustained for owners who had appealed. It is not denied that this would be allowed in the instant case if the statutes of Iowa had made provisions for condemning, like the statutes of the States from whose courts removal was sustained. The exact contention is, that the code of Iowa did, and had power to make the owner, in fact, a plaintiff, though it might have made him a defendant. The analysis of this position involves the whole question, whether this owner was, in fact, the plaintiff.

3.

It is conceded that removal is permissible, where the State creates proceedings to condemn which are, in any substantial sense, judicial proceedings, and that this is certainly

true where such proceeding permits investigation of the right to condemn, as well as compensation due.

Plaintiff's Brief, pp. 18-21.
Traction Co. *vs.* Mining Co., 196 U. S., at 250-251.
Same case, 130 Fed., 790.
Terminal R'y *vs.* R'y, 119 Fed., 209.

If the State statutes under which this was settled are, substantially, like those of Iowa, this question is determined. Of course, plaintiff in error insists that there are vital differences.

The said Federal cases were decided under statutes of Kentucky and Missouri, respectively. If I gather it correctly, appellant urges, in substance, that these differ from the Iowa statutes, in the following:

The one set of statutes provide for a hearing in court on the right to take *and* the compensation due. The Iowa statute concludes the taking without permitting any hearing on the right to condemn, the title passes as soon as the sheriff's jury makes award, and no judicial proceeding is provided save on the question of how much is due.

The statutes of Missouri, as construed, provide:

The petition to condemn may be lodged in the circuit court of the county, or before a judge in vacation, and summons issues. The question of the purpose of the use may be put in issue without regard to legislative declaration that any particular use is a public use. The right to condemn may be put in issue.

Brief of Plaintiff in Error, pp. 18, 19.
Terminal *vs.* Ry., 119 Fed., 209.

By setting out the statutes of Kentucky and those of Iowa in parallel columns, we can at once get a comparative analysis.

See Traction Co. *vs.* Mining Co., 196 U. S., at 241, 242.

KENTUCKY.	IOWA.
Any company authorized to construct a railroad, if "unable to contract with the owner for its (the lands) use for the purposes thereof."	If the owner of land necessary to be taken for either of the purposes named in this chapter refuses to grant the right of way required for such purposes, or if the parties cannot agree upon the compensation to be paid (1999).
Then the railroad may file in the office of the clerk a description and have commissioners appointed to assess the damages. These commissioners are appointed and shall make award in writing, and report to the clerk.	Then the sheriff, upon written application of either party shall appoint freeholders, who shall inspect, and ascertain the damages the owner will sustain by the appropriation, and report to the sheriff in writing (1999).
Upon application of the company, the clerk issues summons to the owner to show cause why the report should not be confirmed. At the first regular term after summons, the court must examine and pass upon the report. If exceptions are filed a jury may be had and judgment rendered on the verdict. Either party may appeal to and have trial *de novo* in the State circuit court.	Either party may appeal from the appraisement by giving "the adverse party" and the sheriff notice, and the court shall try the same as in an action by ordinary proceedings (2009). But no judgment shall be entered except for costs (2011).
Upon payment of the award confirmed, or sum assessed by the court, the railroad is entitled to take possession, for use for which land was condemned, as fully as if title had been conveyed.	An appeal does not delay "the prosecution of work upon said railway" if deposit is made with the sheriff of the sum awarded, which he retains until the determination of the appeal (2010).

If appeal is taken from the county court, possession can be taken only on payment into court of all damages assessed and costs.

No judgment save for costs is entered, and the company may decline to take the land. But it cannot enter on, use or control the premises, unless it pays or deposits, and may be ejected (2011-2012).

I am unable to see any real difference between the Missouri and Iowa statutes. Under one, the question whether property is wanted for a proper use, and compensation due are heard on summons, and by a court, in the first instance. Under the other, the right to condemn also depends on the use, and upon non-agreement with the owner. While, in Iowa, commissioners appointed by the sheriff act, to begin with, an appeal with trial *de novo* is provided; on that trial all the questions permitted in Missouri at the start, may be litigated in Iowa at the finish. If part of them may not be, the Iowa statute is void for denying due process of law. The real difference seems to be merely the point of time in a proceeding when the first court hearing is permitted. Be that as it may, the Terminal case but settles that the proceeding in Missouri is judicial. It does not attempt to hold that different ones would not also be judicial. If, then, there is no difference of substance between the Iowa statutes and those of Kentucky, and the latter create a proceeding which *is* a judicial one, then the Iowa statute creates such a proceeding, even if it differs from one in Missouri, which is confessedly, also, judicial.

In essence, plaintiff in error differentiates these thus:

In Iowa the title passes as soon as the award is deposited with the sheriff. In Kentucky, after a judicial hearing. That, therefore, no question but pay is involved in the Iowa appeal (Brief, pp. 17-18, 42, 43). In Kentucky the county clerk appoints the commissioners. In Iowa, the sheriff. In Kentucky there is no notice given until after the commissioners report. In Iowa, the notice is given to appear before the appraisers, before they act (Brief, 421).

Before this is proceeded with, it is well to remember that this court sustained the Federal jurisdiction, and right to remove, in the Kentucky case, though the removal was attempted *before any action was taken on the report of the commissioners.* At that time, no one should claim that the Kentucky procedure was more judicial than that in Iowa.

Traction Company's case, 196 U. S., at 242, 243, 244.

That commissioners appointed by a county clerk to make an award, on application filed with him, and report that award to him, whereupon the action of a court may, later, be had, is no more a judicial proceeding, before the court does act, than is the report of commissioners appointed by a sheriff, to the sheriff; such award being appealed from, but not yet tried *de novo* on such appeal.

If there be substantial differences, they are in favor of the claim that the Iowa proceeding is, *when begun,* the more judicial of the two. In Kentucky no notice is given before the award is made. In Iowa notice must be given to appear before the appraisers before they make award. This difference is pointed out by appellant, but its significance is misunderstood. To avoid the difficulty of a denial of due process, it points out, time and again, that the Iowa statute requires notice to the owner and gives him an opportunity to be heard. It goes so far as to urge that this notice was in fact given, a thing not found in the record before you (Brief, pp. 20, 29, 42). And, yet, it is contended that this notice is but an opportunity to be present when and where no hearing may be had—to be present at an inquest that has no single judicial attribute.

The statute distinctly recognizes that there is an adversative relation from the beginning. As said, it provides a notice of the time and place of the appraisal. Something was intended to be done by that notice. The statute starts with requiring the application of either "party" to the sheriff (1999). What is more persuasive, it declares that

appeal may be had by serving notice on the sheriff and "the adverse party." Mind you, this notice, of course, precedes the existence of the appeal, and if it is to be served upon "adverse parties," these cannot be created by the appeal, but must exist before the appeal does—a plain statutory declaration that there is an adverse relation between parties, before the appeal starts the controversy to a hearing before a court.

There seems to be no real dissimilarity between the procedure details of the compared State laws. In one, a clerk appoints commissioners, who report him an award made without notice, opportunity being given, on notice, to contest the report in court. In the other, the sheriff appoints appraisers, who report to him, and the owner is given opportunity to appear before they make award, and the right to have that award reviewed in court.

The claims that some questions which are for review in Kentucky are not reviewable in Iowa, and that the sheriff's jury passes title in Iowa, while the court does it in Kentucky, are not tenable, either.

In Kentucky the basis for ordering an appraisement can be filed, only, if filed by a company authorized to construct a railroad which is "unable to contract with the owner" for the use of his land for certain permitted purposes. In Iowa the sheriff appoints appraisers, only, if it is necessary for the railroad to take land for purposes named in the law, and if the owner refuses to grant, or an agreement as to pay cannot be had.

It will be noticed that somewhere, by some one, the following questions may arise for settlement in either State:

In Kentucky—Is the condemnor a company authorized to construct a railroad—Does it desire a permitted use—Is it unable to contract with the owner?

In Iowa—Is the condemnor a railroad—Does it desire land for purposes permitted by law—Does the owner refuse to grant—Can an agreement as to compensation be had?

Now, as to the passing of title:

In Kentucky the railroad has the use of the land after award is confirmed, upon payment of it.

In Iowa it has the right to work, though appeal be taken if it deposit the award. If the award is raised, the larger sum must be deposited to maintain possession. No judgment is entered, and the railroad may withdraw at any stage upon payment of costs, and it may be ejected at any stage if it fail to increase deposits should there be a change in award.

Why does title pass quicker in Iowa than in Kentucky? How can a title be said to pass when it may be taken for non-compliance with new requirements developed in pending litigation. How can title be said to have passed to one who may still refuse to take it. Can the railroad insist it has bought, while the owner has no right to insist he has sold. Why should it be claimed that here there is no question possible save the size of the award? Plaintiff in error practically concedes, that whether the use for which condemnation is sought is a public use, is always a judicial question (Brief, 22). To be sure, it states that Boynton has never attempted to contest any question but the amount of compensation due (Brief, 29). But there is nothing in the record before you to sustain this claim, either. I will not construe this into license to testify to the contrary. But I may submit my inferences upon the record which is here.

The certificate states:

"In his petition and bond to secure such removal the owner referred to and treated himself as the defendant," and the railroad company as the plaintiff in the case.

All men are presumed to know the law. If removal was authorized by urging several issues, which might be presented, and not authorized if but one of them was presented, it is fair to presume that the party desiring removal presented more than one of them; at any rate, the inference is stronger than a claim for which there is no record.

4.

I shall not attempt, now, to investigate the citations made in the opposing brief, for the claim, that the Iowa statutes prevent removal because they permit no review of any question but the award of compensation, the raising of which question makes the owner a plaintiff. I shall assume, for present purposes, that such is the state of the Iowa law. As has been said, if that is so because Iowa made statutes unlike those of Kentucky, then it would have been different had it elected, instead, to make laws like those of Kentucky. Which brings us, squarely, to whether a State has the power to make one law rather than another, and thus abridge the right of removal to the Federal courts.

While the two points have close relations, that a State cannot make a defendant into a plaintiff by naming him plaintiff (which I have tried to demonstrate), is not quite decisive of the one now being discussed. That point is, can a State elect to create actual conditions which must, so long as they are continued, and respected by the Federal court, abridge the jurisdiction of that court. Does the right to remove depend, in any case, upon what law a State chooses to make. Is there a right to remove from one State court, which does not exist as to a court in a different State, there being no difference in the case, and no difference in the status of the one seeking removal except a difference created by State law.

Here is a citizen and resident of Missouri. He has property in Iowa. Under sanction of Iowa law, an attempt is made to take it from him. It is conceded that the value involved exceeds $2,000, and that he has the right to enter the courts of the United States, at some time, in some way. It is conceded that he may enter by original suit confined to litigating the amount of compensation due him. It is asserted that this is all that the State permits to be litigated. He may not be heard in the State courts on whether his property is sought by one authorized to condemn; whether it is needed

for lawful use. He may have contracted the land to the condemnor for a fixed price, and can not oppose a condemnation proceeding which will result in a forced sale at a lower price, with privilege to litigate about it. More land may be sought than the statute authorizes. In spite of a statute that additional right of way may be not condemned without permission from the Board of Railroad Commissioners, he can not urge that no consent was given. The State limits him to review of the size of the award. That is not all. Until he appeals from the award, to a State court, there is, so it is said, no judicial proceeding pending. If he appeals, it is said, he becomes a plaintiff and can not have removal. He must, then, take his aforesaid single question into the Federal court and not appeal. Should he go there after appealing, he will be met with the defense that he went into the State court, and is concluded by his election. If he goes without appealing, he must take chances on litigation whether he did not assent to the award by not appealing.

If the State would but consent to letting him litigate the right to condemn, whether the condemnation law had been obeyed *and* the price due him, and require the taker to begin the taking in the clerk's office instead of the sheriff's, then the attempt of the other to take his land would be the beginning of a suit, and the appeal would be a continuation. It would take the matter into the State court, and it would be removable without doubt or danger.

Ordinarily, when the rights of a non-resident are invaded by means of setting any of the machinery of the State in motion, he can remove. In the instant case, if the State had made its own law different, that right would have existed. So it all comes to just this: By the making of a statute which would have surrounded this taking with due process of law, Boynton could have removed his case. By failure to make the statute so, he is to be confined to having nothing reviewed, except that he may, in the State court, or by instituting a risky suit in the Federal court, find out how much he is to

have for his land—taken without opportunity to test whether properly taken. At the expense of denying due process, the State so shaped it that this owner must either submit to the award or become a plaintiff with right to question nothing but the amount of compensation.

"In a condemnation proceeding the courts of Missouri act as in other trials at law. * * * It would therefore seem that if a non-resident's property is sought to be taken and subjected to a public use, as claimed by this plaintiff, he should be entitled, if he so elects, to have a Federal court determine whether or not the conditions upon which the local laws authorize his property to be condemned, have been fairly and fully complied with, because by the statute the local court is empowered to hear and decide such questions as between a local corporation and a citizen of the State. * * * When the case has been removed into the Federal court it can and should pursue the course of procedure in the trial of the issues, and the appointment of commissioners, as prescribed by the local statute."

Terminal Ry. *vs.* Ry., 119 Fed., at 217.

It is said that when it is proposed to take private property for public purposes, the question of appropriation is one primarily and exclusively for the State to determine. *It is fundamental that private property cannot be taken by any government excepting for purposes which are of a public character, although such taking be accompanied by compensation.* If the purpose be public, the taking may be outright, provided reasonable, certain and adequate provision is made at the time of appropriation to ascertain and secure the compensation to be made to the owner. *Any State enactment in violation of these principles is inconsistent with the due process of law prescribed by the Fourteenth Amendment.* The legislature is not beyond the control of the courts in exercising the power of eminent domain, *either as to the nature of the use, or the necessity of the use of any particular property,* for if the use be not public, or no necessity for the taking exists, the legislature cannot authorize the taking of private property against the

will of the owner, notwithstanding compensation may be required.

Traction Co. *vs.* Mining Co., 196 U. S., at 251, 252.

A State cannot, by any statutory provision, withdraw from the cognizance of the Federal courts a suit in which there is such controversy, or else the judicial powers of the United States therein would be defeated.

Traction Co. *vs.* Mining Co., 196 U. S., at 255.

In Railway *vs.* Jones, 29 Fed. Rep., 193, the case was held to be removable, although the proceedings for condemnation were somewhat different from those in an ordinary trial, and it was said:

"I do not suppose that a State can, *by making special provisions for the trial of any particular controversy, prevent the exercise of the right of removal.* If there was no statutory limitation the legislature could provide for the trial of many cases by less than a common law jury, or, in some other special way; but the fact that it had made such different and special provisions would not make the proceeding any the less a trial or such suit as, if between citizens of two States, could be removed to the Federal courts. *If this were possible, then the only thing the legislature of a State would have to do to destroy the right of removal entirely, would be to simply change and modify the details of procedure.*"

Traction Co. *vs.* Mining Co., 196 U. S., 249.

The fact that the Colorado statute provides for the ascertainment of damages by a commission of three freeholders, unless at the hearing the defendant shall demand a jury, does not make the proceeding *from its commencement* any the less a suit at law. It is an adversary judicial proceeding from the beginning. *The appointment of commissioners to ascertain the compensation is only one of the modes by which it is to be determined.* The proceeding is, therefore,

a suit at law from the time of the filing of the petition and the service of the process upon the defendant.

Searl *vs.* The School District, 124 U. S., 199, 200 (8 Sup. Ct. Rep., 460).

Traction Co. *vs.* Mining Co., 196 U. S., at 248, 249.

Speaking generally, it is for the State primarily and exclusively to declare for what local public purposes private property within its limits may be taken upon compensation, as well as to prescribe the mode in which it may be condemned and taken. But the State may not prescribe any mode of taking private property for a public purpose and ascertaining the compensation, which would exclude from the jurisdiction of the circuit court a condemnation proceeding which, in its essential features, is a suit involving a controversy between citizens of different States. A State cannot tie up a citizen of another State having property rights within its territory, invaded by unauthorized acts of its own officers, to suits for redress in its own courts.

Reagan *vs.* Loan & Trust Co., 154 U. S., 362, 391.

Traction Co. *vs.* Mining Co., 196 U. S., at 252, 253.

If the Judiciary Act of Congress admitted of the case in the county court being brought within the original cognizance of the circuit court, that is an end of the matter, although it be a case of the appropriation of private property to public uses under the authority of the State. *Under any other view, a State, by its own tribunals, could deprive citizens of other States of their property by condemnation, without giving them an opportunity to protect themselves in a national court against local prejudice and influence.*

Traction Co. *vs.* Mining Co., 196 U. S., at 253, 254.

Ry. *vs.* Meyers, 115 U. S., 1 (5 S. C. Rep. 1147), holds that the taking of appeal after inquest does not make application for removal come too late.

It is not true that in no case can the judicial power of the United States be invoked until the question of taking is

consummated by a proceeding in the particular local tribunal designated by the State. In the exercise of the power given the circuit court, that court, while sitting within the limits of a State and having jurisdiction of the parties, is, for every practical purpose, a court of that State. Compensation is not the only thing it can determine.

Traction Co. *vs.* Mining Co., 196 U. S., at 255.

It is not true that the time to remove was after appeal was taken to the State circuit court, where it could be tried *de novo*. The right of removal was perfect whenever there arose a controversy between citizens of different States. Even after appeal to the circuit court the condemning party was, under the Kentucky statutes, entitled to pay into court the damages assessed in the county court, and before the case was concluded in the circuit court to take possession of the land and oust the owner. Clearly the owner was not bound to wait until the proceedings in the county court were concluded, or until he was out of possession, before exercising his right of removal, if the case was a removable one.

Traction Co. *vs.* Mining Co., 196 U. S., 256.

Whenever a right is given by the law of a State, and the courts of such State are invested with the power of enforcing such right, the proceeding may be removed to a Federal court if the other requisites of removability exist.

25 Fed. Rep., 520.

Traction Co. *vs.* Mining Co., 196 U. S., 250.

5.

The time has come to investigate what there is on the other side of this.

The first has no applicability. The second and third certainly are no great help to the position of appellant.

Reisner *vs.* Strong, 24 Kan., 297, has no applicability whatever to this point. It holds, that where a land owner

resorts to appeal from award, this is an election of remedies so that he may not at the same time, in the courts of the same State, enjoin the taking, on the ground that there is no power to take.

Sigafoos *vs.* Talbot, 20 Ia., 214, holds, that one whose land has been taken for a highway may appeal to the district court and have the question as to the amount of damages he is entitled to tried by jury.

Rogat's case, 4 Ia., 343, holds that where no appeal is allowed, the owner may enjoin the taking of his property until just compensation has been ascertained and paid.

The suit was, as already said, a judicial proceeding, initiated in a tribunal which constitutes a part of the judicial establishment of Kentucky as ordained by its constitution, and the court, although charged with some duties of an administrative character, is a judicial tribunal and a court of record.

Traction Co. *vs.* Mining Co., 196 U. S., at 251.

So far as material, the last but holds that special procedure provisions will not oust the Federal jurisdiction.

The case of Boom Company *vs.* Patterson, 98 U. S., 403 (25 L. C. P., 206), upon which appellant lays the utmost stress, is really rather embarrassing to its position. It claims for the case that it establishes the proceedings prior to appeal to be non-judicial, and that the appeal is the beginning of suit.

It will be remembered that its main differentiation of the Iowa and Kentucky statutes is that the condemnor starts by having a court (in fact, it is the clerk) create the appraisers, while in Iowa this is done by the sheriff. Now, if *Patterson's* case is authority for holding that all prior to appeal is not a suit, it is rather hard on that statement of difference.

For *Patterson's* case deals with a Minnesota statute which provides:

The corporation may take private property by applying to the *District Court of the county for the appointment of commissioners to appraise its value, and take proceedings for its condemnation.* The law is framed so as to give proper notice to the owner of the land to secure a fair appraisement of its value. If the award should not be satisfactory to the company, or any one claiming an interest in the land, an appeal may be taken to the District Court where it is to be entered by the clerk "as a case upon the docket" of the court, the persons claiming an interest in the land being designated as plaintiffs and the company seeking condemnation as defendant. The court is then required to "proceed to hear and determine said case in the same manner that other cases are heard and determined in said court." Issues of fact arising thereon are to be tried by a jury unless waived. The assessment by court or jury *to be entered as a judgment against the company,* which is subject to review by the State Supreme Court on writ of error.

The case holds the following and no more:

The power to take private property for public use is the exercise of a sovereign right of eminent domain possessed by the State. The United States, a separate sovereignty, has no right to interfere with this by any of its departments, and cannot investigate the necessity or expediency of an appropriation, judicially.

But notwithstanding this, when the sovereign power attaches conditions to its exercise, whether the conditions have been observed in the proper manner is for judicial cognizance. If that inquiry take the form of a proceeding before the courts, the owners of the land on one side and the one seeking to appropriate on the other, there is a controversy which is subject to the ordinary incidents of a civil suit, and its determination derogates in no respect from the sovereignty of the State.

The proceeding before commissioners appointed to appraise the land is in the nature of an inquest to ascertain value, and is not a suit at law in the ordinary sense of the term. But when it was transferred to the district court by appeal

from the award of the commissioners, it took, under the statute of the State, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents. The only point in issue or open to contest was the compensation to be made to the owner—In other words, the value of the property taken. The case would have been in no essential particular different had the State authorized the company by statute to appropriate the property in question and the owners to bring suit against the company in the courts of law for its value. Such a suit could be transferred if the controversy were between citizens of different States; the same is true of the pending proceeding after removal to the district court.

At the time it was decided, the statute permitted either plaintiff or defendant to remove, and the removal by the land owner was upheld. Hence, it was immaterial to decide whether the land owner was plaintiff or defendant, and was not decided.

It will be noticed that the statute it deals with provides for entering judgment against the company, on appeal. That enabled the decision to hold that the title passed on the award, and that under such a statute the appeal involved nothing but the amount of compensation due. The railroad could not decline to take it, as it can in Iowa. The sale was made, if the statute is valid, when the award was. There was bound to be a judgment for purchase price in some amount. The question whether the statute was valid, and whether removal could be interfered with by keeping the statute in that shape was not mooted. Indeed, it was not necessary to pass on it. For, as said, while the result was to make the owner a plaintiff, that did not affect removal, because, then, a plaintiff could remove as well as a defendant.

But what the *Patterson* case says could be said as well of the Kentucky statute under which the *Traction* case upholds removal, as of the Minnesota statute with which the *Patterson* case deals. If the Minnesota inquest, so called, was nonjudicial, so was the Kentucky procedure at the time when

removal was attempted. The *Traction* case is later. It was decided when there *was* a difference between a plaintiff and a defendant. In view of the last case, the first should not be allowed to declare the Iowa procedure non-judicial.

Simply following the *Patterson* case, and without disclosing the Kansas statute, it is said in Ry. *vs.* Myers, 115 U. S., at page 18:

> In Kansas, a proceeding before a mayor of a city and a jury to take land for widening a street and to ascertain the value of the land taken, and to assess the cost thereof on the property benefited, is not while pending there a suit at law within the meaning of acts of Congress authorizing the removal of cases; but it becomes such a suit at law when transferred to the circuit court of the State on appeal.

Ry. *vs.* Butts (Kan.), 41 Pac. Rep., 948, simply applies Boom Co. *vs.* Patterson in defining the status of inquest and appeal to the district court. Ry. *vs.* Orr, *idem*, 280, applies the Butts case literally.

Gaines *vs.* Fuentes, 92 U. S., 20 (23 L. C. P., 526), (approved in Boom Co. *vs.* Patterson) was a proceeding to annul a will probated in a State court as a muniment of title and to restrain the enforcement of a decree admitting it to probate.

It was there held:

That a controversy between citizens is involved in a suit whenever any property or claim of the parties, capable of pecuniary estimation, is a subject of litigation and is presented by the pleadings for judicial determination, and may be transferred to and tried in the circuit court.

The proceedings in the district court were entitled, Owen *vs.* The Railway. Plaintiff in error moved to dismiss because the case was wrongfully entitled. If true, this was no case

for dismissal; only to correct the title of the action. But we think the case was rightly entitled.

Railway *vs.* Owen, 8 Kan., at page 276, paragraph 2.

Turner *vs.* Holleran, 11 Minn., 253, simply decides that on appeal by the owner nothing but the question of damages to be allowed is involved.

If, that the question of compensation is before the appraisers gives the Federal court jurisdiction, that they also consider the necessity for the taking does not affect the right to remove.

Traction case, 196 U. S., at 250.

It is true the *Myer's* case, 118 Iowa, 315, says that from the statute it plainly appears that the proceeding before the commissioners is not a suit at law, but in the nature of an inquest to ascertain the value:

"No hearing is had and no evidence introduced. The commissioners must inspect the land and determine upon the amount of damages which will be occasioned by the appropriation, and make a written report to the sheriff. Thus far, then, the proceeding is in no respect a suit."

It also says that, on appeal, nothing is reviewed but the amount due; also that the company appropriates the right of way as soon as it pays the assessment.

In *Kirby's* case, 106 Fed., 552, it is said:

The fact that the State statute says the land owner shall be plaintiff and the corporation defendant, is not controlling, but the land owner is actually the plaintiff, because the State court is the first tribunal in which effect can be given to the provisions that the rights of trial by jury shall remain inviolate, and that other provision, that private property may be taken for public uses as soon as damages shall be assessed by a jury.

I rejoice that these cases do not control because enounced by Iowa courts, and that they must be weighed intrinsically. Both overlook that a State cannot by omitting provisions, or making such as destroy the character of a suit for a proceeding, interfere with the Federal jurisdiction. Arranging for less than a common law jury will not avail (*Traction* case, 196 U. S., at 249). This is overlooked in Kirby's case.

As for *Myer's* case,—I am unable to see why no evidence can be introduced before the appraisers. If it is so, why does the statute provide for notice to the owner? It does not seem to be clear, either, why under the Iowa statute the court should not inquire into the right to condemn. It certainly is not clear that the company gets title to the right of way as soon as it pays the award. If anything is clear, it is not bound to take the land even after appeal is tried, and that it may be ousted if it does not keep on depositing. At any rate, neither case passes on the question whether removal can be stopped by such statutes as they claim exist.

In re Railway, 94 N. Y., at page 294, it is said:

> Where the company appeals from the award because it is dissatisfied with the amount awarded, this is a continuation of the proceeding instituted by it to ascertain the compensation payable to the land owners, and to acquire their lands against their will—so held for the purpose of awarding costs.

True, it is said of appeal by the railroad. But what of that. If an appeal by either is a *continuation* of the proceedings instituted, and appeal is a suit, there was a suit for the appeal to continue.

6.

There is another reason why Boynton should be held to be entitled to remove.

In his petition and bond he dealt with himself as defendant. The District Court of Iowa, to whom he addressed his application for removal, granted it. The Federal court en-

tertained it. I contend that this is an adjudication by the State court that the Federal court had jurisdiction on removal.

Not that any court can create jurisdiction in itself by so deciding, but that the existence of jurisdiction, whether a question of fact or law, is triable somewhere, and there concluded, no matter how erroneously decided. While a court may not decide itself into jurisdiction, any final decision by one court having power to pass on whether another has jurisdiction, is conclusive on that particular jurisdiction of that other. It was asserted in the Circuit Court of Appeals that the Circuit had no jurisdiction. Suppose there had been a decision that jurisdiction existed; suppose this was an error; suppose that a case just like it reached here, and this court held there was no jurisdiction—could this appellant then enjoin the enforcement of this judgment which had been sustained by the Circuit Court of Appeals?

The real question is the status of the decision by the State district court.

That it is not final is conceded; that on conflict with a decision on the point by the Federal court, the latter controls, is not doubted. But that does not solve the matter. What is the State decision when there is neither appeal nor conflict? Hardly a nullity, to be collaterally attacked. *Myers'* case, on which appellant lays much stress, is an appeal from a district court decision. Appeals are not resorted to or entertained as to actions of a court which can have no finality or binding force. The exact question is, Can a granting of removal not appealed from, and concurred in by the tribunal having power to nullify it, be attacked collaterally. As said, that it was appealable and subject to a contrary view of the circuit court, is true, but not decisive. Very many decisions are subject to annulment, but are none the less final if not directly attacked.

Whether a case has been in fact removed, may be decided by the State court. If there is conflict the Federal court controls.

Bank *vs.* Dodge, 42 N. J. L., 316.

The decision of a State court granting a removal is a final decision, in the sense that it may be reviewed in the State supreme court, and granting removal is the final disposition of the matter in the State court. And it has a right to determine judicially whether it ought to surrender its jurisdiction.

Telegraph Co. *vs.* Griffith (Ga.), 30 S. E. Rep., 420.
Dillon, Rem. Causes (5 ed.), 174.
Black's Dillon, Rem., par. 191.
Removal Cases, 100 U. S., 474.
Stone *vs.* South Carolina, 117 U. S., 430 (6 Sup. Ct. Rep., 799).

Where defendant in good faith removes, and plaintiff acquiesces, plaintiff may not, after judgment, urge that one plaintiff was a citizen of the same State as defendant. His silence amounts to a stipulation that jurisdiction to remove existed.

Davies *vs.* Lathrop, 13 Fed., 565.

III.

While a resident defendant cannot give the circuit court jurisdiction by removal, it does not follow that it may not, on consent, try a cause removed by a non-resident plaintiff.

Martin's case, 148 U. S., 663 (13 Sup. Ct. Rep., 706), holds, simply, that *removal* by a resident defendant gives no jurisdiction. That is also the holding in Thurber *vs.* Miller, 67 Fed., 371. That is the effect of Fife *vs.* Whittell, 102 Fed., 537, decided, on direct attack, by motion to remand.

The same is the holding of Telegraph Co. *vs.* Brown, 32 Fed., 337, and of Weller *vs.* Co., 32 Fed., 860; also Parkinson *vs.* Barr, 105 Fed., 81.

It is said in Black's Dillon, Removal, section 65:

In proceedings for the condemnation of private property under the power of eminent domain, if the land owner assert his right to compensation on appeal from the award of damages, is to be regarded as the plaintiff (which may or not be the case according to the local practice), then he has no right to remove the cause to the Federal court.

This does not define how far his failure to have that right goes to jurisdiction. The language is loose, and may mean that there is no jurisdiction if he remove, or that upon objection he has no right to remove. The author cites two cases for this proposition.

R'y *vs.* Co, 50 Fed., that on motion to remand, assuming the land owner to be plaintiff, which the court doubts, removal cannot be sustained.

R'y *vs.* Day, 54 Fed., 545, holding, on the contrary, that the land owner, dissatisfied with the award, and who appeals to the State court, is a defendant for the purpose of removal, although the State law gives him the right on such appeal to the opening and closing—the issue being confined solely to the question of damages.

Appellant also cites Martin *vs.* R'y, 151 U. S., 690, which holds:

Section three of the Removal Act is formal, and though obligatory, may to a certain extent be waived. But that diverse citizenship and some other jurisdictional facts prescribed in section two are essential and cannot be waived.

As I view it, these do not establish the contention of appellant, that

There can be no waiver of a defect in jurisdiction due to it that removal is not made by the defendant as required by section two of the Removal Act. Appellant says it is unable to see any distinction between removal on the part of a nonresident plaintiff, and removal on the part of a resident defendant (Brief, 32).

That, it appears to me, ought not to be difficult.

The resident is not afraid of injustice from his own courts.
Rawle, Const., page 233.

The very basis and spirit of the act is therefore against removal by him. Non-residence and not party status is the vitals of the cases cited by appellant. The Removal Act is not a local change of venue statute. What is more controlling, if a resident, defendant could remove, he would put into the Federal court by that method what he never could place there in any other way. His removal would not set an existing jurisdiction in motion—it would create jurisdiction. This last statement is of the essence of the dispute. Counsel, in my view, utterly misapprehend the scope of section two of the act. They insist that *every* part of section two goes to jurisdiction; that if every element of removability exists, removal by a non-resident defendant is still essential and not to be waived. They do this, though they admit that section two is merely a limit upon the *class of cases* that may be removed—which logically excludes the status of the non-resident as a jurisdictional element. (Brief, 38, 35.) They overlook that parts of the section have been declared not to be jurisdictional—the provisions dealing with residence in the District.

Ry. *vs.* Lumber Co., 37 Fed. 3 (Brewer).
Fales *vs.* Ry., 32 Fed., 672.

Where a party who might invoke the original jurisdiction of the Federal court removes, the removal is not of the jurisdiction. It becomes a mere method of invoking an already existing power to act judicially.

It is now settled that a suit cannot be removed from a State court unless it could have been brought originally in the Circuit Court of the United States.

Both the Act of 1875 and that of 1877 gives the circuit courts original jurisdiction of all suits having the requested amount in dispute, and in which there was a controversy between citizens of different States. So that what was a suit

or controversy to which, by reason of diverse citizenship, the judicial power of the United States extended, must still be deemed such suit under the Act of 1877. The only effect of the latter Act, so far as the present question is concerned, was to restrict the right of removal from the State court to cases of which the circuit court could take original cognizance.

Traction Co. *vs.* Mining Co., 196 U. S., at 251.
R'y *vs.* Davidson, 157 U. S., at 208.

Ayres *vs.* Watson, cited by appellant, 113 U. S., 594 (5 Sup. Ct. Rep., 642), holds, that where the suit is civil, there is more than the required amount in controversy, and it is a controversy between citizens of different States; that *then* the parties named in the statute may remove, and that the jurisdictional part is the one which defines cases *in which* a removal may be made. That the other requirements, such as time for removal, or form, are modal, but are also essential if insisted on.

Sec. 2.

Section two permits the removal of any suit of which by section one jurisdiction is given to the Federal courts.

R'y *vs.* Lumber Co., 37 Fed., 3.
Fales *vs.* R'y, 32 Fed., 672.

Section two refers to the parts of section one by which original jurisdiction is conferred.

R'y *vs.* Davidson, 157 U. S., at 208.

To put it in other words: A rightful removal presupposes original jurisdiction to try the case removed. That exists as to a non-resident who has become a plaintiff in a State court, though he is subject to the affirmative defense of election when he reaches the Federal court. Had he not gone into the State court he could have sued originally in the Federal court. The defense of election does not go to jurisdiction. The

original jurisdiction does not exist for a resident defendant. When the resident defendant removes there is no pre-existing jurisdiction to set in motion. When the non-resident plaintiff removes, the removal is a mere means of invoking existing jurisdiction, therefore modal, and capable of being waived.

III.

If the non-resident was a plaintiff and therefore did not succeed in giving the circuit court jurisdiction by his attempt at removal, still as he had the right to bring this very suit into that very court by original suit, the court had power, on consent, to try it. Under such circumstances, the abortive removal was but an informal method for invoking the original jurisdiction of the court.

We save dispute on this head because plaintiff in error admits that Boynton might have sued originally in this circuit court. The admission is coupled with citing the Traction Company case and the Boom Company case, which so hold.

He could, had he so elected, have brought a suit in the Federal court, alleging the appropriation of his land in the condemnation proceedings, and would have had the right in such suit in said court to recover the value of his land (Brief, 43, 44).

It is practically conceded that no such point as this was mooted in Martin *vs.* Snyder, and it is the fact that it was not, even if it be assumed it was involved to be passed on (Brief, 46).

The real objections urged are election and that, to treat this removal, if abortive, as an original trial on consent,

would create a new class of cases for the circuit court (Brief, 48). It is also said (Brief, 48, 52):

> It is presumed that a case is without the jurisdiction until the contrary appears.
>
> Citing Trust Co. *vs.* Henderson, 170 U. S., 511, Brief, 48, 52.

Proceeding by elimination, it is submitted that while it is presumed that a case is without the jurisdiction, this hardly establishes a rule, that when it appears there was jurisdiction to try a cause where it was tried, it will be presumed it was there tried in a way that there was no power to try it in.

As for creating a new class of circuit court cases, the utmost that was done was to obtain trial of a case which that court always could try, by an irregular method when an objection, not made, would have stopped such trial. There is nothing new about it. It has always been the law that if a transfer be attempted to a court which may hear the cause, originally, or upon proper transfer, the transfer is so defective that there is no power to try as a transferred cause, and it is there tried without objection, it is a case of voluntary litigation on that side of the court that had jurisdiction.

A removal is surely no more jurisdictional than a transfer by appeal, yet, what we contend for has always been ruled as to appeals to a court having original jurisdiction of the matter involved in such appeal.

A justice of the peace of the State of Wisconsin, failed to render judgment on a verdict for the plaintiff returned by the jury impaneled to try the case. The defendant appealed to the county court, where both parties appeared and entered upon a trial of the cause, without any objection on the part of either that no appeal lay from the verdict of the jury; and judgment was rendered against plaintiff. Held in an action in one of the courts of Iowa, on the transcript of such judgment and proceedings, that the appearance of the parties and their going to trial on the merits, gave the appellate court jurisdiction of their persons, and rendered

its proceedings and judgment valid, it appearing that such court, under the laws of Wisconsin, would have had jurisdiction to try the cause had it been originally brought there.

Danforth *et al. vs.* Thompson, 34 Iowa, page 243.

In County *vs.* Rolls, 18 Ill., 29, it was held: Although a court not having jurisdiction can not take it by consent of parties, and its judgment is a nullity, yet if, on appeal from such court to a court having jurisdiction in the matter, the parties voluntarily appear and consent to a trial, the judgment in the latter court will be binding.

The court having original jurisdiction of the subject-matter, jurisdiction of the parties is waived by voluntarily appearing and consenting to a trial between them.

Where an appeal has been taken from a justice of the peace to the district court upon questions of law and fact, and the case there tried, and judgment entered therein without objection, the jurisdiction of the district Court is complete, even though the justice had no jurisdiction for the reason that the amount in controversy exceeds one hundred dollars.

Lee *vs.* Parrett, 25 Minn., 128.

An unauthorized appeal to the district court was taken from a judgment of a justice of the peace. The parties appeared in the district court, submitted to its jurisdiction amended their pleadings, and consented to a trial of the case on a day fixed. Held that the district court acquired jurisdiction to hear and determine the case on its merits, notwithstanding the irregular mode in which the case was brought into that court.

Wrolsen *vs.* Anderson, Minn., 55, N. W. R., 597.

It is held in Baggs *vs.* Martin, 179 U. S., 206:

While consent does not give jurisdiction, yet when a court has power to determine a particular controversy without re-

moval, one who brings the case there, cannot say, against jurisdiction, that the sole reason assigned for removing the case is not well founded.

It goes without saying, that had failure to remove effectively, in a case where there was original jurisdiction, been jurisdictional, it could make no difference who brought the case, and that bringing it could have created no estoppel to assert such want of jurisdiction.

If the act of Congress admits of a case in court being brought within the original cognizance of the Federal court, that is an end of the matter, though it be a case of the appropriation of private property to public uses under the authority of the State.

Traction Co. *vs.* Mining Co., 196 U. S., at 253-4.

Again, at pages 246, 247:

Why could not the proceeding instituted in the county court have been brought originally in the Federal Court? The case as made in the county court was beyond question a judicial proceeding. It related to property rights. The citizenship is diverse and the value more than $2,000. This meets the very language which gives to the circuit courts original cognizance concurrent with the courts of the several States. In view of these explicit provisions, it is clear that the proceeding in the county court was a suit or controversy within the Federal law. The judicial power of the United States is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case to which the Constitution extends the judicial power of the United States. A proceeding to take land by eminent domain and to determine compensation to be made is a suit at common law when initiated in a court. It is an attempt to enforce a legal right.

Traction Co. *vs.* Mining Co., 196 U. S., at 246, 247.

The circuit court, recognizing the right of the traction company to appropriate the land in question, if necessary for its purposes, could do all that is required by the Ken-

tucky statute and meet fully the ends of justice. *Besides, the court always looks to substance and not to mere forms. Mere forms are not of vital consequence in cases of condemnation.*

Kohl *vs.* U. S., 91 U. S., 367, 375.
U. S. *vs.* Jones, 109 U. S., 513, 519.
Traction Co. *vs.* Mining Co., 196 U. S., 254.

2.

On the objections on part of appellant not already fully noticed the only relevant citations deal with election.

It is said in section 65, Black's Dillon, Rem., *on motion to remand:*

The land owner who has appealed to the State court waives the right to remove, by having the record sent to the State supreme court for review by certiorari.

This was a direct attack. It but holds that one party had waived a right. Waiver is an affirmative defense. Waiver by one party may always be waived by his opponent.

It is claimed for Thurber *vs.* Miller, 14 C. C. A., 432, that a plaintiff who commences a suit in a State court cannot afterwards remove it, and that he is bound to remain in the forum of his own selection—it is not indicated whether the defense of election of remedies goes to the jurisdiction, and may or may not be waived.

Black's Dillon on Removals, section 65, states squarely that, with a single exception, the statute has limited the right of removal to the defendant and has excluded the plaintiff from the exercise of this privilege. This sounds quite formidable, but, after all, does not state whether or not he may not remove upon consent of his adversary in cases where all the elements of jurisdiction, such as civil suit, amount in controversy and diversity of citizenship exist. In other words, while the author says the right to remove is restricted to the defendant, he does not say that a plaintiff who might originally have brought the suit may not bring it in by an irregular removal, consented to by his adversary. It is sig-

nificant that this reason is given for the conclusion. "When he has chosen to begin his proceedings in the State court, he must abide by his election cannot transfer his cause to another forum." It will hardly be claimed, seriously, that a mere election of remedies may not be waived by one's opponent.

3.

There is a great volume of further citations. I am unable to see their use. Hard labor required to investigate them has only demonstrated that my labor was of no benefit to this suit. I indulge the hope that the analysis of them which follows will save the time of the court. I would gladly omit them, if that might not, by possibility, be construed into an admission that they were of value to the plaintiff in error.

Torrence *vs.* Shedd, 144 U. S., 527 (12 Sup. Ct. Rep., 726), simply holds that where there is no jurisdiction, there should be a remand to the circuit court with direction to render judgment for costs, and to remand the case to the State court.

State of Minn. *vs.* Northern Securities Co., 194 U. S., 48 (24 Sup. Ct. Rep., 598). If it does not appear from the statement of plaintiff that the case arises under the Constitution or laws of the United States, the case cannot be removed from the State court, and consent to such removal is of no avail.

Mansfield *vs.* Swan, 111 U. S., 379 (4 Sup. Ct. Rep., 510), holds that if diversity of citizenship does not appear, or the absence of it does appear, the court will dismiss on its own motion.

Stevens *vs.* Nichols, 130 U. S., 230 (9 Sup. Ct. Rep., 518). Diversity of citizenship must be made to appear affirmatively

to have existed at the commencement of the action and not simply at the time of asking for removal.

Jackson *vs.* Allen, 132 U. S., 27 (10 Sup. Ct. Rep., 9). Where the record does not sufficiently show the citizenship of the parties at the commencement of the action, and at the time of filing petition for removal, the defect cannot be cured by amendment, and the cause must be remitted, with directions to remand to the State court.

Crehore *vs.* Ry., 131 U. S., 240 (9 Sup. Ct. Rep., 692): Where it appears on appeal that the petition below does not show jurisdictional grounds for removal, there will be direction to the circuit court to remand to the State court without allowing amendment.

Graves *vs.* Corbin, 132 U. S., 571 (10 Sup. Ct. Rep., 196): Where it appears on appeal to the supreme court, from the circuit court, that the suit is one of which the latter court should not have taken jurisdiction (on question of whether controversy was wholly between citizens of different States) the supreme court will reverse the judgment and remand the cause with costs against petitioner for removal.

The question is not what the parties may be allowed to do but whether a court will affirm or reverse the judgment of the circuit court where it appears that it is a case to which the judicial power of the United States does not extend.

Scott *vs.* Sanford, 19 Howard, 393 (15 L. C. P., 691) (dissenting opinion).

A congressional enactment, that the circuit court shall not take cognizance of a suit by an assignee of a chose in action, unless the original holder could have maintained the suit, is not in conflict with the constitution.

Sheldon *vs.* Sill, 8 How., 441 (12 L. C. P., 1147).

Turner *vs.* Bank, 4 Dallas, 8 (1 L. C. P., 7): Where the endorsee of a note sues, jurisdiction is not made out by showing diversity of citizenship between him and defendant unless the record also shows that the payee and endorsee and the maker were of diversity of citizenship.

Thompson *vs.* Ry., 6 Wallace, 134 (18 L. C. P., 765): A court of equity will not make decree if it appears that there is not an absence of a plain and adequate remedy at law.
U. S. *vs.* Huckabee, 16 Wall., 414.

Fruit Co. *vs.* Henderson, 170 U. S., 511 (18 Sup. Ct. Rep., 685). If jurisdiction given a Federal court is not in terms exclusive jurisdiction, the courts of the State retain concurrent jurisdiction subject to removal in a proper case.

Hanrick *vs.* Hanrick, 153 U. S., 192 (14 Sup. Ct. Rep., 835), holds a defendant in partition, to which all the defendant and all the plaintiffs are indispensable parties, and where each and all the defendants contest rights asserted by plaintiff, and defendant was a citizen of the same State as some of the plaintiffs, cannot remove his suit from the State court upon the ground of prejudice or local influence between himself and other defendants.

U. S. *vs.* Hudson, 7 Cranch, 32 (3 L. C. P., 259). The courts of the U. S. have no common law jurisdiction in cases of libel against the government.

Gerling *vs.* Ry., 151 U. S., 673 (14 Sup. Ct. Rep., 533), simply holds that late removal may be waived and cannot be raised for the first time on writ of error.

Fisk *vs.* Hanarie, 142 U. S., 459 (12 Sup. Ct. Rep., 217), holds that, on motion to remand, late removal will remand.

Ex parte Pennsylvania, 137 U. S., 451 (11 Sup. Ct. Rep., 141) holds, simply, that change in statute has taken away the remedy of mandamus to compel the circuit court to take jurisdiction of a cause; and writ of error. Also, that a cause cannot be removed on account of prejudice or local influence unless the matter in dispute or value is more than $2,000.00.

4.

There was no need to cite cases for the proposition that there could be no estoppel to assert want of jurisdiction over the subject-matter. Fourteen are cited. I have examined them. I shall not print the result. It would have been more effective to devote this effort on part of appellant to cite cases tending to show there was want of jurisdiction. If it does not exist there is no legal estoppel. Cases there are in which a moral estoppel is created. But it is not enforceable.

All of which is respectfully submitted.

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